BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston

STATE OF WEST VIRGINIA,

Appellee,

v.

Appeal No.: 33048

KEVIN RAY MIDDLETON

Appellant/Defendant Below.

BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

AUTHORITIES

Pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, Appellant/ Defendant Below, Kevin Ray Middleton, files the instant Brief of Appellant in support of his appeal from the July 25, 2005 Order of the Circuit Court of Kanawha County, West Virginia.

Appellant further hereby adopts and incorporates by reference all material contained in his Petition for Appeal, previously filed with this Court.

I. PROCEEDINGS AND RULINGS BELOW

In the January 2004 term of the Circuit Court of Kanawha County, a Kanawha County Grand Jury indicted the Appellant, Kevin Ray Middleton, on two counts - One count of sexual abuse by a parent, teacher or guardian, and One count of first degree sexual abuse.

Mr. Middleton's trial was held on January 24, 2005. Immediately prior to the trial, a suppression hearing was held on Appellant's motion to suppress the post-polygraph statement taken January 16, 2002. The trial court denied Appellant's motion and the statement was allowed into evidence. The case was tried before a jury for two days, and at the conclusion of the trial the jury returned a verdict of guilty as to both counts. Following the trial, Mr. Middleton's bond was revoked and he was incarcerated in the South Central Regional Jail.

By Order entered on July 25, 2005, the Circuit Court sentenced Mr. Middleton as to Count I to an indeterminate term of not less than ten (10) nor more than twenty (20) years with credit for time spent in jail of 185 days. The Circuit Court also imposed a fine of $5,000.00.

As to Count II, the Appellant, Kevin Ray Middleton, was sentenced to an indeterminate term of not less than one (1) nor more than five (5) years. Mr. Middleton was fined $500.00. Count II was to run consecutively with Count I. The Circuit Court refused, however, to credit Mr. Middleton for his time spent in jail of 185 days as to Count II. The Circuit Court further

sentenced Mr. Middleton to a period of supervised release for a period of twenty-five (25) years pursuant to West Virginia Code § 62-12-26.

In July, 2005, the Appellant, Kevin Ray Middleton filed his Notice of Appeal with the Circuit Court of Kanawha County, West Virginia, from the July 25, 2005 Order. On November 15, 2005, Appellant, Kevin Ray Middleton, filed a motion to reconsider pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure. The Circuit Court denied Mr. Middleton's motion for reconsideration by Order dated November 17, 2005. Also, on November 15, 2005, the Appellant, Kevin Ray Middleton, filed motion a to correct his sentence with the Circuit Court. While that motion had not been ruled upon by the lower court at the time of Mr. Middleton's Petition, the Circuit Court has since denied the motion.

On November 22, 2005, Mr. Middleton timely filed a Petition for Appeal with this Court and the Court heard oral argument on the Petition on March 14, 2006. Mr. Middleton's Petition was then granted by this Court. Appellant files the instant brief pursuant to the briefing schedule.

II. STATEMENT OF FACTS

While Appellant adopts and incorporates by reference the Statement of Facts set forth in his previously submitted Petition for Appeal, Appellant provides here a summarized version of the facts to expedite understanding the factual references made in Appellant's Discussion of Law.

On January 14, 2002, the date the allegations against Appellant/Defendant Below, Kevin Ray Middleton, were first made, he had been in a relationship for a few months with Mary Wilkins, the mother of two twin daughters, Shaylie and Chelsea. The girls, who were five years old at the time, were born during her marriage to her ex-husband, Tom Wilkins. For several

weeks prior to this date, Mr. and Mrs. Wilkins had been continuously involved in extremely contentious litigation over Mr. Wilkins' obligation for back child support in the amount of nearly $10,000.00.

Around 2:30 or 3:00 p.m. on January 14, 2002, Mr. Wilkins contacted Trooper Nichols at the Quincy detachment and claimed that during a telephone conversation with his daughters the previous evening one of the girls had informed him that Mr. Middleton had sexual contact with her. Trooper Nichols then proceeded with Mr. Wilkins, without any questioning relating to Mr. Wilkins' relationship with his ex-wife, and without contacting Mrs. Wilkins regarding the allegation, to Mrs. Wilkins' home. Upon their arrival, they found Mr. Middleton working on broken plumbing. The girls were not there – they were, as they always were after attending school – with their day care baby sitter, Martha Atha.

Trooper Nichols and Mr. Wilkins then proceeded to the baby sitters home. Trooper Nichols, again without contacting Mrs. Wilkins, who had legal and physical custody of the children, took them from their sitter's home and gave them into the custody of Mr. Wilkins. Several hours later that evening, Mr. Wilkins took the children to Women and Children's Hospital Emergency Room where they were examined by the sexual assault nurse examiner, Suzanne King.

During her testimony, Ms. King stated that Mr. Wilkins had brought Shaylie in with a complaint of sexual assault. Ms. King then conducted a complete physical examination of Shaylie, including a complete sexual assault exam. While admitting that it was not unusual for physical evidence of sexual abuse to not be found during such exams, she stated that none of the examinations of Shaylie discovered any indications of any injuries of any kind or of any abuse.

The next morning, on January 15, 2005, having kept both girls with him overnight in violation of the custody agreement, Mr. Wilkins took both girls to the state police barracks in Quincy to be interviewed by Trooper Nichols. Trooper Nichols then proceeded to conduct an interview with Shaylie and Chelsea (eventually, over a period of 12 days, he personally conducted three different interviews with Shaylie and took three separate statements from her, including one in which she stated that Mr. Middleton had stabbed her with a knife).

Also on the 15th, Mr. Middleton came to the Quincy detachment to give a statement, at the request of Trooper Nichols (Nichols, however, denies he made this request). After being given his *Miranda* warnings and signing a waiver, Mr. Middleton gave a statement to the effect that he had never harmed either of the children and left the detachment. Later that day, Trooper Nichols contacted either Mr. Middleton or Mrs. Wilkins and requested that Mr. Middleton return on the 16th to take a polygraph examination (Nichols admits he made this request).

One of the central issues – factual and legal - in this appeal revolves around whether or not the statement elicited from Mr. Middleton at the end of several hours interrogation following his polygraph examination on January 16, 2002, is admissible.

Appellant moved to suppress the post-polygraph statement taken January 16, 2002, and a suppression hearing was held immediately prior to the trial on January 24, 2005. During the suppression hearing, testimony was taken from three State Troopers – Trooper Aaron Nichols; Sgt. Christopher Smith; and Sgt. Bledsoe.

Mr. Middleton appeared at the Quincy detachment around 9:30 a.m. on January 16, 2002, as requested. Sgt. Smith, the polygraph examiner, gave Mr. Middleton *Miranda* warnings and had him sign waivers in connection with the polygraph test (*Appeal Record*, pp. 210, 211), (*Transcript*, p. 45-46). Sgt. Smith testified that the Waiver of Rights form and the Polygraph

Release form were both presented to Mr. Middleton one after the other, following the recitation of *Miranda* rights (*Transcript*, pp. 50-51), and admitted that nowhere on the *Miranda* or waiver forms signed before taking the polygraph test does it state that Mr. Middleton would be subject to post-test questioning (*Appeal Record*, pp. 210, 211). Mr. Middleton signed the both forms shortly after 10:00 a.m. and Sgt. Smith administered the polygraph test. The exam lasted around one hour.

At the conclusion of the test, Sgt. Smith informed Mr. Middleton that the test indicated he was not telling the truth and began interrogating him about the results (*Transcript*, p. 61). Sgt. Smith admitted that to his knowledge, no one ever went over the *Miranda* warnings with Mr. Middleton after the polygraph test for the post-test questioning (*Transcript*, p. 63); and that while he did not take Mr. Middleton's cell phone away from him, he had "asked him to turn off a pager or cell phone..." (*Transcript*, p. 64).

Trooper Nichols admitted during his testimony that his post-polygraph interrogation of Mr. Middleton took place in the Quincy Station holding room that has handcuff – D-rings – on the wall (*Transcript*, p. 30); that following the polygraph test, Mr. Middleton was interviewed by four different officers over 5 hours with no lunch break and only one smoke break, and that no *Miranda* warnings were given after those administered before the polygraph test (*Transcript*, pp. 29, 40-43). Trooper Nichols further admitted that he had taken Mr. Middleton's cell phone from him (*Transcript*, p.35-36) and that he never returned it to him - even though he admitted that "at one point in time I spoke with a subject that said he was Mr. Middleton's son on the cell phone" who wanted to speak with Mr. Middleton (*Transcript*, p. 35-36). Trooper Nichols also confirmed that to his knowledge, Mr. Middleton was never informed, that Mr. Middleton's family had hired an attorney for him (*Transcript*, p. 35).

Sgt. Bledsoe, while joining the other officers in denying the Mr. Middleton ever requested an attorney during the post-polygraph interrogation, admitted that to his knowledge no one had administered *Miranda* warnings to Mr. Middleton after the ones given to him before the polygraph exam at 10 a.m. (*Transcript*, p. 81); that he began his questioning of Mr. Middleton around 3 or 3:30 p.m. (*Transcript*, p. 83); and that he had moved Mr. Middleton to another room before beginning to question Mr. Middleton (*Transcript*, p. 88-89). It was during Sgt. Bledsoe's interrogation of Mr. Middleton that the statement at issue was obtained.

Mary Wilkins (the mother of the two children who her ex-husband alleged had been abused by Mr. Middleton), testified during the suppression hearing that sometime between 11:00 a.m. and noon she had asked Trooper Nichols to obtain the cell phone from Mr. Middleton so she could call her work and inform them she was going to be late. (*Transcript*, p. 114); that around 3:00 p.m., Mr. Middleton's stepson, Tommy, called on the phone and asked to speak to Kevin whereupon she gave the phone to an officer (she thinks Lemmon) to take back to Mr. Middleton so he could speak with his stepson (*Transcript*, p.118); and that she later learned from Tommy that the phone had instead been given to Trooper Nichols who refused to let Tommy speak with Kevin (*Transcript*, p. 119). Mrs. Wilkins also stated that she requested several times to speak with Mr. Middleton as the day progressed and was told she was not allowed to do so (*Transcript*, p. 118).

Aaron Alexander, an attorney, testified during the suppression hearing that on January 16, 2005, Mr. Middleton's family had contacted him and specifically retained him to represent Mr. Middleton; that early on the afternoon of January 16, 2005, he had called the Quincy detachment, spoken with a Trooper, and requested that the officers inform Mr. Middleton he had been retained as his attorney, that he was advising Mr. Middleton not to make any statements

until he had met with him, and further informed the Trooper that any questioning of Mr. Middleton should cease until he (Mr. Alexander) arrived at the detachment (*Transcript*, pp. 123-126).

Appellant, Kevin Middleton, testified at the suppression hearing that he was not told when he signed the waiver forms prior to the polygraph test that he would be questioned afterwards; that he was never told he was free to leave following the polygraph test; that after the interrogation began following being told he did not pass the polygraph test, he did not feel he was free to leave; that he had been ordered by Sgt. Smith to turn off his cell phone; that several different officers came in and out – separately and in groups – to interrogate him; that Trooper Nichols took his cell phone from him and it was never returned to him; that he was only allowed one smoke break during the several hour interrogation and that Sgt. Smith had accompanied him outside while he smoked; and that on several occasions after the interrogation became heated, he stated "I need a lawyer" but that the interrogation continued with Trooper Nichols mocking him saying "innocent people don't need lawyers" (*Transcript*, pp. 90-108).

After over 5 hours of tag-team interrogation during which they continuously badgered Mr. Middleton that he must be guilty because he had failed the polygraph test, without being given any *Miranda* warnings except for those given prior to the polygraph test, and without informing Mr. Middleton that a lawyer had not only been retained for him but had called and requested any interrogation to cease until he arrived, the officers obtained a statement from Mr. Middleton. In it, Mr. Middleton stated that on one occasion he had rolled over in his sleep and accidentally rubbed the child Shaylie who had apparently climbed in bed with the couple at some point during the night. Mr. Middleton stated that as soon as he realized he was not touching Mrs.

Wilkins, but was touching the child, he immediately stopped. After obtaining this statement, Sgt. Bledsoe told Mr. Middleton he could leave.

At the end of the suppression hearing on this matter, however, the trial court found that Mr. Middleton's testimony "not credible" as to his statements that he had requested an attorney during the interrogation and that he did not believe he was free to leave once the post-polygraph interrogation began. (*Transcript*, p. 210, 213) The trial court also somehow found that the fact that Mr. Middleton had not been told an attorney had been hired for him, that the attorney had called and directed all interrogation to cease until he arrived to speak with Mr. Middleton was irrelevant. (*Transcript*, pp.213-214) The trial court then denied Appellant's motion and the January 16, 2002, statement was allowed into evidence.

Another critical issue in this case is the trial court's ruling, at the beginning of the defendant's case-in-chief at trial, that appellant was not permitted to present evidence regarding Mr. Wilkins' motive and intent in making the allegations against Mr. Middleton. A main portion of appellant's defense, particularly after the trial court ruled the post-polygraph statement admissible, rested on presenting evidence that Mr. Wilkins not only had motive for bringing false allegations (the recent renewal of litigation over Mr. Wilkins' failure to meet his obligation for back child support in the amount of nearly $10,000.00), but further, via the testimony of a police officer, Officer Scott Duff, that Mr. Wilkins had filed several false police reports in the past in an attempt to harass his ex-wife and a previous boyfriend. (*Transcript*, pp. 348-352)

The trial court not only denied Appellant the opportunity to present the above evidence through others (*e.g.*, Officer Duff and Mrs. Wilkins), it further ruled that appellant was prohibited from questioning Mr. Wilkins' directly regarding these matters. (*Transcript*, pp. 349-352)

At the conclusion of the trial, the jury returned guilty verdicts on both Counts and Mr. Middleton was remanded to the South Central Regional Jail pending disposition.

The trial court subsequently denied Mr. Middleton's post-trial motion for a new trial and on July 25, 2005, it entered its Order sentencing Mr. Middleton was sentenced to an indeterminate term of ten (10) to twenty (20) years on Count I and an indeterminate term of one (1) to five (5) on Count II. Said sentences were to run consecutively. In imposing the sentences, however, the Circuit Court only granted Mr. Middleton credit for time served as to Count I and no credit for time served as to Count II. Mr. Middleton had been incarcerated pre-indictment and post-jury verdict on both counts. The total credit for time served was 185 days.

Mr. Middleton appeals his conviction and sentence based on the errors enumerated below in his Assignments of Errors.

III. ASSIGNMENTS OF ERROR

A. The Circuit Court Erred In Allowing Appellant's Extrajudicial Inculpatory Statement To Be Admitted Into Evidence At Trial.

1. **The Police Subjected Appellant To Custodial Interrogation Or Interrogation In A Custodial Atmosphere Without Giving Him The Required Miranda Warnings.**

2. **The Police Failed To Obtain A Voluntary, Knowing And Intelligent Waiver Of Appellant's Right To Counsel For The Post-Polygraph Interrogation.**

3. **The Police Violated Appellant's Miranda Rights By Failing To Cease Their Interrogations Following Appellant's Request For Counsel And The Waiver Signed For The Polygraph Test Did Not Constitute A Waiver Of Right To Counsel For The Post-Polygraph Interrogation.**

4. **It Is Clear From The Totality Of The Circumstances That Appellant's Extrajudicial Inculpatory Statement Was Not Voluntary But Was The Result Of Coercive Police Activity.**

B. The Circuit Court Erred In Denying Appellant The Opportunity To Confront The Complaining Father Of The Children Or To Present Evidence That He Had Ill Motive And Intent Toward Appellant And Had Filed Prior False Reports With The Authorities.

C. The Circuit Court Erred In Failing To Credit Appellant's Incarceration Time To Both Counts At Sentencing.

IV. POINTS AND AUTHORITIES

A. The burden is on the State to prove by a preponderance of the evidence that extrajudicial inculpatory statements were made voluntarily before the statements can be admitted into evidence against one charged with or suspected of the commission of a crime. *Syllabus Point 1, State v. Bradshaw*, 193 W.Va 519, 457 S.E.2d 456 (1995), cert. denied, 516 U.S. 872 (1995).

B. "In the trial of a criminal case, the State must prove, at least by a preponderance of the evidence, that a person under custodial interrogation has waived the right to remain silent and the right to have counsel present.' *Syl. Pt. 2, State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980); *Syllabus Point 4, State v. State v. Smith*, 218 W.Va. 127, 624 S.E.2d 474 (2005)

C. "The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case." *Syl. Pt. 5, State v. Starr*, 158

W.Va. 905, 216 S.E.2d 242 (1975); *Syllabus Point 6, State v. Smith*, 218 W.Va. 127, 624 S.E.2d 474 (2005)

D. Whether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances. *Syllabus Point 2, State v. Bradshaw*, 193 W.Va 519, 457 S.E.2d 456 (1995), *cert. denied*, 516 U.S. 872 (1995).

E. Where police have given *Miranda* warnings outside the context of custodial interrogation, these warnings must be repeated once custodial interrogation begins. Absent an effective waiver of these rights, interrogation must cease. *Syllabus Point 4, State v. Bradshaw*, 193 W.Va 519, 457 S.E.2d 456 (1995), *cert. denied*, 516 U.S. 872 (1995).

F. When evaluating the voluntariness of a confession, a determination must be made as to whether the defendant knowingly and intelligently waived his constitutional rights and whether the confession was the product of an essentially free and unconstrained choice by its maker. *Syllabus Point 7, State v. Bradshaw*, 193 W.Va 519, 457 S.E.2d 456 (1995), *cert. denied*, 516 U.S. 872 (1995).

G. "'An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.' *Syllabus point 1, State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987)." *Syllabus Point 3, State v. Giles*, 183 W.Va. 237, 395 S.E.2d 481(1990); *Syllabus Point 5, In re P.*, 516 S.E.2d 15 (W.Va. 04/22/1999)

H. *Miranda* warnings are required whenever a suspect has been formally arrested or subjected to custodial interrogation, regardless of the nature or severity of the offense. *Syllabus Point 1, State v Preece*, 383 S.E.2d 815, 181 W.Va. 633 (1989)

I. The sole issue before a trial court in determining whether a traffic investigation has escalated into an accusatory, custodial environment, requiring *Miranda* warnings, is whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest. *Syllabus Point 3, State v Preece*, 383 S.E.2d 815, 181 W.Va. 633 (1989)

J. The factors to be considered by the trial court in making such a determination, while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and non-verbal responses to the police officers; and the length of time between the questioning and formal arrest. *State v Preece*, 383 S.E.2d 815, 181 W.Va. 633 (1989)

K. Unreasonably lengthy, intimidating questioning may be the strongest indication that *Miranda* warnings are required for protecting the suspect's fifth amendment rights, and that such a situation may also implicate other constitutional or procedural protections. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317, 335 (1984). *See* also,

Mallory v. United States, 354 U.S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957); *State v. Wilson*, 294 S.E.2d 296 (1982); *State v Preece*, 383 S.E.2d 815, 181 W.Va. 633 (1989)

L. In determining whether the initial *Miranda* warnings have become so stale as to dilute their effectiveness so that renewed warnings should have been given due to a lapse in the process of interrogation, the following totality-of-the-circumstances criteria should be considered: (1) the length of time between the giving of the first warnings and subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statement differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect. *Syllabus Point 5, State v. Deweese*, 213 W.Va. 339, 582 S.E.2d 786 (2003).

M. The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation…The Clause's primary object is testimonial hearsay…Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination…The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Crawford v. Washington*, 124 S.Ct. 1354, 541 U.S. 36, 158 L.Ed.2d 177 (2004)

N. An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices, or motives. *Syllabus Point 7*, in part, *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820 (2001); *Syllabus Point 1*, in part, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

O. A defendant who is being held for custodial interrogation must be advised, in addition to the *Miranda* rights, that counsel has been retained or appointed to represent him where the law enforcement officials involved have knowledge of the attorney's retention or appointment. This rule is based on the theory that without this information, a defendant cannot be said to have voluntarily and intelligently waived his right to counsel. *See, Syllabus Point 1, State v. Hickman*, 175 W.Va. 709, 338 S.E. 2d 188 (1985); *Syllabus Point 5, State v. Hager*, 204 W.Va. 28, 511 S.E.2d 139 (1998).

P. However, states cannot arbitrarily deny a defendant the ability to proffer evidence that is "'relevant and material, and ... vital to the defense.'" *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446, 73 L. Ed. 2d 1193, 1202, (1982) (quoting *Washington v. Texas*, 388 U.S. 14, 16, 87 S. Ct. 1920, 1922, 18 L. Ed. 2d 1019, 1021 (1967)). *See State v. Jenkins*, 195 W. Va. 620, 627, 466 S.E.2d 471, 478 (1995) ("'[A] state may not impose arbitrary limits on the admissibility of evidence which would hamper the fact-finding process, without violating the [Constitution of the United States].'") (quoting *State v. Beck*, 167 W. Va. 830, 840, 286 S.E.2d 234, 241 (1981))). *State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999)

Q. While ordinarily rulings on the admissibility of evidence are largely within the trial judge's sound discretion, a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense... *Syllabus Point 2* of *State v. Martisko*, 211 W.Va. 387, 566 S.E.2d 274 (2002).

R. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense' " *Holmes v. South Carolina*, No. 04-1327 (U.S. 05/01/2006); *Crane v. Kentucky*, 476 U. S. 683, 689-690 (1986); *California v. Trombetta*, 467 U. S. 479, 485 (1984).

S. Rule 806. Attacking and supporting credibility of declarant. When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his or her hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. (As amended by order entered June 15, 1994, effective July 1, 1994.) *West Virginia Rules of Evidence*.

V. DISCUSSION OF LAW

A. The Circuit Court Erred In Allowing Appellant's Extrajudicial Inculpatory Statement To Be Admitted Into Evidence At Trial.

"This Court is constitutionally obligated to give plenary, independent, and de novo review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions." *Syl. Pt. 2, State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994); *Syl. Pt. 3, State v. Smith*, 218 W.Va. 127, 624 S.E.2d 474 (2005)

1. The Police Subjected Appellant To Custodial Interrogation Or Interrogation In A Custodial Atmosphere Without Giving Him The Required Miranda Warnings.

In *State v Preece, Syllabus Point 1*, 383 S.E.2d 815, 181 W.Va. 633 (1989), this Court held that:

> ***Miranda* warnings are required** whenever a suspect has been formally arrested or subjected to custodial interrogation, regardless of the nature or severity of the offense. (Emphasis added)

The *Preece* Court, citing to the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966), went on to explain that:

> The warnings that **must be provided** occur when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (cite omitted) The ruling was intended to apply only **when the suspect was interrogated in a custodial atmosphere**, as it is in this situation that the suspect will be induced "to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. (Emphasis added)

More recently, in *State v. Deweese*, 213 W.Va. 339, 582 S.E.2d 786 (2003), the Court cited with approval the United States Supreme Court's holding in *Miranda v. Arizona*, 384 U.S.

436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), that, "law enforcement **officers must inform suspects of certain fundamental constitutional rights prior to initiating custodial interrogation.**" (Emphasis added) The *Deweese* Court continued citing to *Miranda's* holding that a suspect "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726.

The *DeWeese* Court then adopted *Miranda*'s holding that, "**...[T]his warning is an absolute prerequisite to interrogation.** No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." *Miranda*, 384 U.S. at 469-472 , 86 S. Ct. at 1625-1626. Further, under *Miranda*, the mere presence of defense counsel at an interrogation does not negate the necessity for providing the warning against self-incrimination. *DeWeese, supra.*

The question then arises as to what constitutes "being in custody" or a "custodial interrogation" or a "custodial atmosphere" so as to trigger the absolute requirement for *Miranda* warnings. This Court has provided guidelines on several occasions to assist the lower courts in determining such.

"'An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.' *Syllabus point 1, State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987)." *Syllabus Point 3, State v. Giles*, 183 W.Va. 237, 395 S.E.2d 481(1990); *Syllabus Point 5, In re P.*, 516 S.E.2d 15 (W.Va. 1999).

"Whether the individual was "in custody" is determined by an objective test and asking whether, viewing the totality of the circumstances, a reasonable person in that individual's position would have considered his freedom of action restricted to the degree associated with a formal arrest." *State v. Potter*, 197 W.Va. 734, 744, 478 S.E.2d 742, 752 (1996); *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279 (1983) (per curiam); *State v. Hopkins*, 192 W. Va. 483, 453 S.E.2d 317 (1994); *see* also *Thompson v. Keohane*, 516 U.S. 99, 113-14 n. 13 (1995) (viewing the totality of circumstances, would a reasonable person in the defendant's position have considered his freedom of action restricted to the degree associated with a formal arrest); *State v. McCracken*, 218 W.Va. 190, 624 S.E.2d 537 (2005); *Oregon v. Mathiason*, 97 S. Ct. 711, 429 U.S. 492 (1977) (That the questioning took place in a police station is relevant but not controlling); *State v. Honaker*, 193 W. Va. 51, 60-61, 454 S.E.2d 96, 105-06 (1994) (applying "objective circumstances" test to determine whether the defendant was in custody); *Miranda v. Arizona*, 384 U.S. 436 (1966) (questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way).

In *Preece, supra,* the Court provided guidance to the trial courts in applying such an objective test stating that:

> The factors to be considered by the trial court in making such a determination, while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and non-verbal responses to the police officers; and the length of time between the questioning and formal arrest. *State v Preece, Id.*

The *Preece* Court, citing to the U.S. Supreme Court in *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317, 335 (1984), explained further stating that, "For practical purposes, ...[u]nreasonably lengthy, intimidating questioning may be the strongest

indication that *Miranda* warnings are required for protecting the suspect's fifth amendment rights, and that such a situation may also implicate other constitutional or procedural protections. *Berkemer*, 468 U.S. at 440, 104 S. Ct. at 3150, 82 L. Ed. 2d at 335. *See* also *Mallory v. United States*, 354 U.S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957); *State v. Wilson*, 294 S.E.2d 296 (1982). *State v Preece, Id.*

A review of various cases that found a custodial atmosphere or interrogation did not exist, reveals that the facts in those cases to be remarkably different from those in the instant case.

For example, in *Potter, supra*, the Court found that the defendant had been specifically advised by the Deputy to leave and speak no further about the allegations, due to their severity. The defendant then stated that he wished to give a statement and willingly remained at the police station until his confession had been transcribed. In *State v. Hickman*, 175 W.Va. 709, 338 S.E. 2d 188 (1985), the Court found that the defendant had been fully informed of his *Miranda* rights on three different occasions by three different law enforcement officials, that the defendant had been informed of the fact that his family had contacted an attorney on his behalf *and* was asked if he wanted to consult with the attorney before making a statement and specifically declined to do so.

In reviewing the record in this case, however, it is difficult to understand how the trial court concluded that Mr. Middleton's interrogation by the police on January 16, 2002, was neither a "custodial interrogation" nor conducted in a "custodial atmosphere." As discussed above, the totality of the circumstances surrounding the extraction of Mr. Middleton's post-polygraph examination statement on January 16th (the tag-team interrogations, the length of interrogations, the failure to return Mr. Middleton's cell phone or inform him family members

were calling him, and the failure to inform Mr. Middleton that an attorney had been retained for him and was on his way to the detachment) as well as Mr. Middleton's testimony that the officers continued to interrogate and badger him even after he requested a lawyer (*Transcript*, pp. 100-101) and that he firmly believed he was not free to leave (*Transcript*, p. 100, 108), clearly support Appellant's contention that his post-polygraph interrogation took place in a custodial atmosphere.

It is uncontested that the only *Miranda* rights given to Mr. Middleton on January 16th were those administered prior to, and solely in relation to, his taking the polygraph test; he was never given *Miranda* rights at any point before or during the post-polygraph interrogation.

In Sy*llabus Point 4* of *State v. Bradshaw*, *supra*, this Court clearly held that:

> **Where police have given *Miranda* warnings outside the context of custodial interrogation, these warnings must be repeated once custodial interrogation begins.** Absent an effective waiver of these rights, interrogation must cease. (Emphasis added)

In *DeWeese*, *supra*, the Court adamantly held that, "while a defendant may waive the rights articulated under the *Miranda* warnings, a defendant cannot, as a matter of law, waive the reading of the *Miranda* warnings...**[T]he right to have *Miranda* warnings given simply cannot be waived.** (Emphasis added) The reason for this, stated the Court, is found in the *Miranda* decision which held that:

> Prior to any questioning the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right of the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *Miranda*, 384 U.S. at 444-45, 86 S. Ct. at 1612. (Emphasis added.) *Miranda* recognizes a waiver only of rights to which a defendant has been informed. *See Syl. pt. 7, in part, State v. Plantz*, 155 W. Va. 24, 180 S.E.2d 614 (1971) ("A statement freely and voluntarily made by an accused while in custody or deprived of his freedom by the authorities and subjected to questioning is admissible in evidence against him if it clearly appears that such statement was freely and voluntarily made after the accused had been advised of his constitutional right[s] . . . [and] after he has been so advised, he knowingly and intelligently waives such rights." (Emphasis added)).

See also, *State v. Potter*, 197 W. Va. 734, 738 n.4, 478 S.E.2d 742, 746 n.4 (1995) (explaining that "In *Miranda v. Arizona*, 384 U.S. 436, 444-45, 478-79, 86 S. Ct. 1602, 1612, 1630, 16 L. Ed. 2d 694, 706-07, 726 (1966), the United States Supreme Court held that law enforcement officers must inform suspects of the privilege against self-incrimination prior to initiating custodial interrogation. The Supreme Court announced that a suspect "'must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" 384 U.S. at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726."). *Ftnt 10, State v. Perry*, 204 W.Va. 625, 515 S.E.2d 582 (1999).

Further, even if *Miranda* warnings have been given prior to the beginning of a custodial interrogation, the *DeWeese* Court found there is a decided lack of consensus regarding when **renewed** *Miranda* warnings must be given. Thus, after reviewing the holdings in several jurisdictions, the *DeWeese* Court adopted the following tests:

> In determining whether *Miranda* warnings became so stale as to dilute their effectiveness because of a significant lapse in the process of interrogation, the following totality-of-the-circumstances criteria should be considered: (1) the length of time between the giving of the first warnings and subsequent interrogation, (2) whether the warnings and the subsequent interrogation were given in the same or different places, (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, (4) the extent to which the subsequent statement differed from any previous statements, and (5) the apparent intellectual and emotional state of the suspect.

See also *People v. Delgado*, 832 P.2d 971, 973 (Colo. Ct. App. 1991); *See* also *DeJesus v. State*, 655 A.2d 1180, 1195 (Del. 1995); *State v. Lester*, 709 N.E.2d 853, 856 (Ohio Ct. App. 1998); *State v. Birmingham*, 527 A.2d 759, 761-762 (Me. 1987); *Commonwealth v. Hughes*, 555 A.2d 1264, 1276 (Pa. 1989).

Even if it would be considered that the *Miranda* warnings given prior to the polygraph test applied to the post-polygraph interrogation, given the actual circumstances of Mr. Middleton's interrogation, clearly four of the five *DeWeese* totality-of-the-circumstances criteria for determining whether *Miranda* warnings have become so stale as to dilute their effectiveness have been satisfied.

As discussed above, during the suppression hearing, the officer who conducted the polygraph test, Sgt. Smith, admitted that the polygraph waiver form signed by Mr. Middleton prior to the test did not contain any mention of interrogation following the test. (*Transcript*, p. 60) Also, during the hearing, Sgt. Bledsoe, Sgt. Smith and Trooper Nichols admitted that Mr. Middleton had been interrogated by several different officers, that the interrogations took place over a period of several hours, and that Mr. Middleton had been moved from room to room during the interrogations. (*Transcript*, pp. 30-31, 40-43, 63-66, 82-83, 88-89) Additionally, the statement at issue completely differed from the statement Mr. Middleton gave only the day before (*Record*, pp. 297-198) Finally, Mr. Middleton's testimony during the suppression hearing showed that he was in a highly emotional state during the interrogations.(*Transcript*, pp. 97-107)

Despite this Court's holding in Sy*llabus Point 4* of *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995) *cert. denied*, 516 U.S. 872 (1995), that "...[M]iranda warnings outside the context of custodial interrogation...[m]ust be repeated once custodial interrogation begins," however, the interrogating officers admitted that this was not done in the instant case.

An objective review of the facts and testimony thus clearly shows that Mr. Middleton was subjected to a "custodial interrogation" and was in a custodial atmosphere at the time of his interrogation following the polygraph test. Additionally, it is undisputed that the only *Miranda* warnings given to Mr. Middleton were those given prior to the polygraph test; warnings that did

not contain any reference to a post-test interrogation. Based on the facts and law discussed *infra*, the trial court clearly erred in finding that Mr. Middleton was not subjected to interrogation in a custodial atmosphere and that he had been properly given *Miranda* warnings. Thus, the court's ruling allowing Mr. Middleton's January 16, 2002, post-polygraph statement to be admitted clearly was in error and Mr. Middleton's conviction and sentence should be reversed and the case remanded for a new trial.

2. The Police Failed To Obtain A Voluntary, Knowing And Intelligent Waiver Of Appellant's Right To Counsel For The Post-Polygraph Interrogation.

"A defendant who is being held for custodial interrogation must be advised, in addition to the *Miranda* rights, that counsel has been retained or appointed to represent him where the law enforcement officials involved have knowledge of the attorney's retention or appointment. This rule is based on the theory that without this information, a defendant cannot be said to have voluntarily and intelligently waived his right to counsel." *See, Syllabus Point 1, State v. Hickman*, 175 W.Va. 709, 338 S.E. 2d 188 (1985); *Syllabus Point 5, State v. Hager*, 204 W.Va. 28, 511 S.E.2d 139 (1998).

See also, *e.g.*, *People v. Harris*, 703 P.2d 667 (Colo. App. 1985); *Weber v. State*, 457 A.2d 674 (Del. 1983); *People v. Smith*, 93 Ill. 2d 179, 66 Ill. Dec. 412, 442 N.E.2d 1325 (1982); *State v. Matthews*, 408 So. 2d 1274 (La. 1982); *Lodowski v. State*, 302 Md. 691, 490 A.2d 1228 (1985); *Elfadl v. State*, 61 Md. App. 132, 485 A.2d 275 (1985); *Commonwealth v. McKenna*, 355 Mass. 313, 244 N.E.2d 560 (1969); *State v. Luck*, 15 Ohio St. 3d 150, 472 N.E.2d 1097 (1984), *cert. denied*, 470 U.S. 1084, 85 L. Ed. 2d 144, 105 S. Ct. 1845 (1985); *Lewis v. State*, 695 P.2d 528 (Okla. Ct. Crim. App. 1984); *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979) (In Banc),

cert. denied, 446 U.S. 945, 64 L. Ed. 2d 802, 100 S. Ct. 2175 (1980); *State v. Jones*, 19 Wash. App. 850, 578 P.2d 71 (1978).

In explaining the reasoning behind its adoption of *Syllabus Point 1*, the *Hickman* Court provided a detailed analysis of other jurisdiction's positions on this issue and cited favorably to the Oregon Supreme Court's reasons stated in *State v. Haynes*, 288 Or. at 72, 602 P.2d at 278, for requiring law enforcement officials to advise a defendant that counsel has been retained or appointed for him in order to effectuate a valid *Miranda* waiver:

> To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. If the attorney appears on request of one's family, that fact may inspire additional confidence. (Footnote omitted).

The *Hickman* Court also cited to the Delaware Supreme Court's holdings on this issue in *Weber v. State*, 457 A.2d at 685-86:

> When a suspect does not know that an attorney, who has been retained or properly designated to represent him, is actually present in the police station seeking an opportunity to render legal assistance, and the police do not inform him of that fact, there can be no intelligent and knowing waiver. . . . The *Miranda* warnings indicate to the suspect an abstract right to counsel, and the waiver of that right only means that for the moment the suspect is foregoing the exercise of that conceptual privilege. But that is clearly distinct from the opportunity to confer with a specifically retained or designated attorney who is actually present, seeking to render legal assistance. . .
> ". . . To allow the police to use tactics which prevent or forestall a suspect from exercising his rights is inconsistent with the clear purpose of *Miranda*. . . . Furthermore, the use of such tactics is logically incongruous with the concept of a knowing and intelligent waiver. . . ." (Citations omitted).

The *Hickman* Court then concluded stating that, "We are persuaded by the majority view which holds that a defendant being held for custodial interrogation must be advised, in addition to the *Miranda* rights, that counsel has been retained or appointed to represent him where the law enforcement officials involved have knowledge of the attorney's retention or appointment. To

allow law enforcement officials simply to recite the *Miranda* rights without mentioning the availability of a specific attorney is inherently deceptive and cannot be countenanced if the principles of *Miranda* are to retain their validity." *Id.*

While the *Hickman* Court found that the defendant's waiver in that case was admissible, it specifically cautioned that, "The critical factor in the present case is that the defendant was advised that his parents had contacted an attorney and was asked if he wanted the attorney present... Since the defendant was fully informed of his *Miranda* rights and of the fact that his family had contacted an attorney on his behalf and was asked if he wanted to consult with the attorney, which he declined, we conclude the defendant voluntarily and intelligently waived his Fifth Amendment right to counsel." *Id.*

Following testimony during the Suppression Hearing in the instant case, the trial court asked for any case law on whether the defendant should have been informed that an attorney had been hired for him and that the attorney had directed the police to inform the defendant he would be coming to the state police office and should not give a statement until he had spoken with him. The Court then recessed thirty minutes for lunch.

After the lunch recess, the prosecutor informed the Court it had found two cases, a 1986 U. S. Supreme Court case, *Moran v. Burbine*, 106 S. Ct. 1135, 475 U.S. 412 (1986), and the West Virginia case, *State v. Hager*, 204 W.Va. 28, 511 S.E.2d 139 (1998). In informing the trial court regarding the law in *Hager*, *id.*, the prosecutor stated:

> The West Virginia Supreme Court, in State versus Hager, which is a 1998 case, actually found that they didn't have to answer the question about whether or not a lawyer's or a third party's assertion of the defendant's right to counsel was appropriate or not, because they found that the lower court made the correct decision when it concluded that the attorney/client relationship had not, in fact, been established.
>
> But they do state, secondly, "Even if we decline to accept that finding by the lower court, the Supreme Court's", that is the U.S. Supreme Court's, "Moran decision",

the one that I just cited to you, "would compel an evaluation of whether the police had an obligation to inform Mr. Hager of legal representation if such representation existed and the police had knowledge thereof.

"We do not squarely address that hypothetical. We do note, however, the significance of the Moran decision and its guidance should such a situation arise."

(*See, Transcript*, Volume 1, Suppression Hearing, pp. 210-212.)

What the prosecutor completely failed to inform the trial court, however, was while the Court had made that comment in the text of the opinion, the *Hager* Court's holding at *Syllabus Point 5,* citing to *Syllabus Point 1* of *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985) was that:

> A defendant who is being held for custodial interrogation **must be advised**, in addition to the *Miranda* rights, **that counsel has been retained or appointed to represent him** where the law enforcement officials involved have knowledge of the attorney's retention or appointment. This rule is based on the theory that **without this information, a defendant cannot be said to have voluntarily and intelligently waived his right to counsel.** *Syl. Pt. 1, State v. Hickman*, 175 W. Va. 709, 338 S.E.2d 188 (1985).

While the *Hager* Court found Mr. Hager's statement to be admissible, the facts in *Hager, supra*, make it completely distinguishable from the instant case. In *Hager, supra*, the police contended that they had no knowledge of the hiring of a lawyer for the defendant. Additionally, the defendant's contention was that his sister, not his attorney, had called the police station and told the officers an attorney had been hired for Mr. Hager. After reviewing the record, the *Hager* Court determined that the lower court's finding that **no legal counsel had been retained** and that therefore no obligation to inform Mr. Hager existed was correct. Thus, the *Hager* Court declined to address the issue of "whether the police had an obligation to inform Mr. Hager of legal representation if such representation existed and the police had knowledge thereof," given the Supreme Court's Moran decision, but simply noted "the significance of the Moran decision and its guidance should such situation arise." *Hager, Id.*

In *Moran v. Burbine, supra,* (a 6-3 decision with a strong dissent on this specific issue) the U. S. Supreme Court also found the specific facts of the case, *i.e.,* "Prior to each session, respondent was informed of his *Miranda* rights, and on three separate occasions he signed a written form acknowledging that he understood his right to the presence of an attorney and explicitly indicating that he "[did] not want an attorney called or appointed for [him]" before he gave a statement[.]" and that "At no point during the course of the interrogation, which occurred prior to arraignment, did he request an attorney[.]" to be determinant in reaching its decision. As discussed above, however, in the instant case Mr. Middleton was never given *Miranda* rights or provided with a waiver form except for that immediately preceding and in relation to the polygraph test.

As this Court stated in the *Hager* opinion, "[t]he significance of the *Moran* decision and its guidance" should be noted as issue is squarely presented in the instant case. Along with noting the actual decision of *Moran, supra,* however, this Court must also note that the *Moran* Court further held that:

> **We acknowledge that a number of state courts have reached a contrary conclusion.** Compare State v. Jones, 19 Wash. App. 850, 578 P. 2d 71 (1978), with State v. Beck, 687 S. W. 2d 155 (Mo. 1985) (en banc). We recognize also that our interpretation of the Federal Constitution, if given the dissent's expansive gloss, is at odds with the policy recommendations embodied in the American Bar Association Standards of Criminal Justice. Cf. ABA Standards for Criminal Justice 5-7.1 (2d ed. 1980)...**[N]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law.** (Emphasis added)

[Indeed, it should be noted that of all the jurisdictions cited in *Hickman, supra,* in its listing of states that require a defendant to be informed of a specifically retained or appointed attorney for a waiver to be considered knowing and voluntary, only one has changed its position

since the *Moran* decision. Additionally, several more states have specifically rejected *Moran* position and adopted the majority view.]

In 1990, the Delaware Supreme Court, in *Bryan v. State of Delaware*, 571 A.2d 170 (Del. 1990) revisited its decision in *Weber*, *supra*, (that this Court cited to extensively in *Hickman*, *supra*). The *Bryan* Court resoundingly stated that:

> Today we...[r]eaffirm our holding in *Weber*...Our decision today examines the prerequisites for a voluntary, knowing and intelligent waiver of the right to counsel in Delaware. Our most recent examination of the issue was in *Weber*:
>
> > To . . . effectuate the protection given to the accused by *Miranda*, and ensure that a suspect knowingly and intelligently waives his rights, we establish the following rule for the guidance of the trial court: if prior to or during custodial interrogation, and unknown to the suspect, a specifically retained or properly designated lawyer is actually present at a police stateion seeking an opportunity to render legal advice or assistance to the suspect, and the police intentionally or negligently fail to inform the suspect of that fact, then any statement obtained after the police themselves know of the attorney's efforts to assist the suspect, or any evidence derived from any such statement, is not admissible on any theory that the suspect intelligently and knowingly waived his right to remain silent and his right to counsel as established by *Miranda*.
>
> ...For purposes of the protections afforded by the Delaware Constitution, there is no distinction between an in-person request by retained counsel to render assistance to his client and a telephonic request by that lawyer.

Also post-*Moran*, in *State v. Joslin*, 332 Or. 373, 29 P.3d 1112 (2001), the Oregon Supreme Court revisited its holding in *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979) (another case cited extensively by the *Hickman* Court). After acknowledging the *Moran* holding, the *Joslin* Court reaffirmed its holding in *Haynes* that:

> We hold that a suspect who has previously been told in general terms of his right to counsel and has waived this right must be informed when counsel actually seeks to consult with him and must voluntarily and intelligently have rejected that opportunity, before further statements may thereafter be taken from him and used against him. *Haynes, id.* at 61.

The *Joslin* Court continued, reaffirming its additional holdings from *Haynes* that:

> "We hold only that when unknown to the person in this situation an identified attorney is actually available and seeking an opportunity to consult with him, and the police do not inform him of that fact, any statement or the fruits of any statement obtained after the police themselves know of the attorney's efforts to reach the arrested person cannot be rendered admissible on the theory that the person knowingly and intelligently waived counsel." *Id.* at 70

> Finally, the court noted that it was immaterial that the defendant's wife, rather than the defendant, had hired the lawyer, or that the lawyer, in fact, ultimately had declined to represent the defendant. Rather, it was sufficient that the lawyer had come to the police station "prepared at least to assume the initial responsibility of an attorney, and [the] defendant was denied the opportunity to decide whether he would retain [the lawyer] in that role or proceed without him." *Id.* at 72 n 5.

The *Joslin* Court then addressed the issue of whether the defendant's waiver was valid because the interrogating detective personally had not been told about the existence of the defendant's lawyer or the lawyer's specific requests, and reaffirmed and cited to its prior holding in *State v. Simonsen*, 319 Or. 510, 878 P.2d 409 (1994), that:

> "Defendant had a right to have th[e] invocation by his lawyer of his right to remain silent honored, at least until he was able to consult with the lawyer or, in the alternative, he waived his right to such a consultation after being fully apprised of the situation that actually existed." *Id.* at 514 (emphasis added

> The court in *Simonsen* further held that the fact that the interrogating detective was unaware of the lawyer's invocation of the defendant's right to remain silent was not dispositive.
> We hold that a lawyer's request to a responsible officer of a police organization that any questioning of the lawyer's client cease must be honored promptly by that organization, whether or not one or more members of the organization individually are ignorant of the fact or nature of the request.

As the *Hickman* holding (*Syllabus Point 1*) is one of the issues that are squarely before this Court in the instant case, it is appropriate to note the reason the *Hickman* Court gave in reaching the holding. After a detailed review of case law from multiple jurisdictions, and after citing extensively the *Haynes*, *supra*, and *Weber*, *supra*, cases, the *Hickman* Court stated:

> We are persuaded by the majority view which holds that a defendant being held for custodial interrogation must be advised, in addition to the *Miranda* rights, that

> counsel has been retained or appointed to represent him where the law enforcement officials involved have knowledge of the attorney's retention or appointment. **To allow law enforcement officials simply to recite the *Miranda* rights without mentioning the availability of a specific attorney is inherently deceptive and cannot be countenanced if the principles of *Miranda* are to retain their validity**. (Emphasis added)

Indeed, in its *Bryan* decision, the Delaware Supreme Court, again citing to *Haynes*, *supra*, as well as to Justice Stevens' strong dissent in *Moran*, *supra*, succinctly described the knowledge necessary for the defendant in determining the voluntariness of a statement:

> [t]o knowingly, voluntarily and intelligently waive this right a defendant must be informed that his counsel has attempted or is attempting to render legal advice or perform legal services on his behalf. To hold otherwise would be to condone "affirmative police interference in a communication between an attorney and suspect." *Moran*, 475 U.S. at 456, n.42 (Stevens, J. Dissenting)

As the *Hickman* Court held in *Syllabus Point 1*, such a "…[r]ule is based on the theory that without this information, a defendant cannot be said to have voluntarily and intelligently waived his right to counsel." *Hickman*, *supra*.

As stated above, while the Court in *Hickman*, *supra*, then went on to affirm the defendant's conviction, its facts are distinguishable from the instant case as the Court found Mr. Hickman had been given his *Miranda* rights on three different occasions by three different law enforcement officials and "*that the defendant was advised of the fact that his family had contacted an attorney on his behalf and was asked if he wanted to consult with the attorney*[.]" *Id.*

In this case, however, the evidence is uncontested that following the polygraph examination, Mr. Middleton was subjected to over 5 hours of interrogation by several different state troopers and was never apprised of his *Miranda* rights during this time. Further, while the *interrogating* officers stated they were not told of Mr. Alexander's call to the detachment, **it is**

uncontested that Mr. Alexander personally did call, did speak with an officer at the detachment, did inform the officer that he had been retained to represent Mr. Middleton and did direct that Mr. Middleton be informed of the representation and that he advised him to not give any statement until he (Mr. Alexander) arrived at the station. (*Transcript*, pp. 123-126)

Nothing has changed in the law or society that invalidates this Court's holdings in *Hickman, supra*, and *Hager, supra*, despite the *Moran* decision (or possibly because of the strong dissents such as that by Justice Stephens or its acknowledgement that its holding is contrary to the majority view and allowing the states to adopt "different requirements"). Nor has anything changed that invalidates the analysis set forth by the *Haynes* Court and this Court's adoption of it in *Hickman, supra*, that:

> To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. If the attorney appears on request of one's family, that fact may inspire additional confidence. (Footnote omitted).

Indeed, as this Court has previously held on a number of occasions:

> The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution.

Syllabus Point 2, Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979); *Syllabus point 1, State v. Bonham*, 173 W. Va. 416, 317 S.E.2d 501 (1984). *See* also *Champ v. McGhee*, 165 W.Va. 567, 270 S.E.2d 445 (1980); *Hendershot v. Hendershot*, 164 W.Va. 190, 263 S.E.2d 90 (1980); *Adkins v. Leverette*, 161 W.Va. 14, 239 S.E.2d 496 (1977); *State ex rel Carper v. West Virginia Parole Board*, 509 S.E.2d 864 (W.Va. 1998); *Syllabus Point 1*, 07/20/95 *State v. Osakalumi*, 1995.WV.0000173 <http://www.versuslaw.com>

Given the facts and law discussed above, it is clear that the trial court's ruling allowing Mr. Middleton's January 16, 2002, post-polygraph statement to be admitted was in error. As such, Mr. Middleton's conviction and sentence should be reversed and the case remanded for a new trial.

3. The Police Violated Appellant's Miranda Rights By Failing To Cease Their Interrogations Following Appellant's Request For Counsel And The Waiver Signed For The Polygraph Test Did Not Constitute A Waiver Of Right To Counsel For The Post-Polygraph Interrogation.

"Once a person under interrogation has exercised the right to remain silent guaranteed by W.Va.Const. art. III, section 5, and U.S.Const. amend.V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial." *Syllabus Point 2, State v. Jones*, 216 W.Va. 392, 607 S.E.2d 498 (2004); *Syllabus Point 3, State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980). *See* also *Syllabus Point 1, State v. Woodson*, 181 W. Va. 325, 382 S.E.2d 519 (1989); *Syllabus Point 4, State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

This requirement was recently referenced again in *Footnote 16, State v. Flippo*, 212 W.Va. 560, 575 S.E.2d 170 (2002), where the Court, in discussing the burden on the State in assessing an implied consent to search as, "[a]nalogous to the burden the State has of stopping an interrogation of a suspect when he/she requests counsel, even though the suspect never expressly states that he/she no longer wishes to talk. *See Minnick v. Mississippi*, 498 U.S. 146, 147, 111 S. Ct. 486, 488, 112 L. Ed. 2d 489 (1990) ("[T]he police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel." Citing *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694 (1966)) *Flippo, Fn. 16*, in part.

As to the issue of whether Mr. Middleton's waiver executed for the polygraph test extended to the post-polygraph interrogation, the Court addressed the issue recently in *State v. Jones, supra,* where it cited extensively to *United States v. Leon Delfis,* 203 F.2d 103 (1st Cir. 1999):

> After careful review, we cannot accept the district court's holding that León-Delfis waived his right to counsel for purposes of the post-polygraph questioning...
> [I]t does not follow that León-Delfis waived his right to counsel for post-test questioning because he waived his right to pre-test and test questioning: waivers of rights are specific.
>
> The waivers León-Delfis signed did not specifically mention the possibility of post-polygraph questioning, and Agent López failed to explain that post-polygraph questioning would occur. All these facts suggest exactly the opposite conclusion than that made by the district court: that León-Delfis having signed two previous waivers did not mean he knowingly and intelligently waived his rights for post-polygraph questioning.
>
> Looking at the totality of the circumstances and specifically focusing on the relevant inquiry articulated by courts referred to above, we hold that the district court erred in concluding that León-Delfis intelligently and knowingly waived his Sixth Amendment right to counsel for the post-test interrogation and that his confession was not admissible. *Id.* 203 F.3d 108-112.

The *Jones* Court also reviewed the argument that the decision in *Wyrick v. Fields,* 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982), allows a waiver of right to counsel signed for a polygraph test also covers any post-polygraph interrogation, stating:

> [*W*]*yrick* does not stand for the principle that a knowing, voluntary, and informed waiver of the rights to silence and to counsel prior to taking a polygraph test extends to post-test interrogation. The correct reading of *Wyrick* is as the Court stated in *United States v. Gillyard,* 726 F.2d 1426 (9th Cir. 1984): The primary issue therefore is whether as a matter of law the district court was foreclosed by *Wyrick v. Fields, supra,* from finding that the defendant did not freely and voluntarily waive his *Miranda* rights. The government argues that *Wyrick* establishes a per se rule that *Miranda* warnings are not required after a polygraph examination when there was a valid waiver prior to the examination. That approach is exactly what the Court in *Wyrick* condemned. Wyrick focused on whether or not the Eighth Circuit had misapplied *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and created an unjustified per se rule that defendants must always be re-advised of their *Miranda* rights before a post-polygraph interrogation commences. The Court criticized the Eighth Circuit

for adopting a per se rule, and not examining the totality of the circumstances as *Edwards* requires. (See footnote 3)

See also *State v. Johnson*, 47 Or.App. 1165, 615 P.2d 1181 (Or. App. 1988) (holding that trial court erred in admitting incriminating statement made by defendant after polygraph examination had ended without requiring state to make a clear showing that admissions were voluntary and that defendant waived his constitutional rights to remain silent and to have counsel present); *Canler v. Commonwealth*, 870 S.W.2d 219 (Ky. 1994) (holding that confession made by defendant following polygraph examination was involuntary and thus inadmissible). *Jones, supra.*

The *Jones* Court further elaborated on the waiver issue of a waiver stating in *Footnote 3*, in part:

The prosecution also points to *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994), where we sustained the admission of a confession given after a polygraph test. In that case, however, the defendant had not been arrested, arguably was not in custody, **and did not have a lawyer** (emphasis added)... [I]n *Deweese* [*State v. Deweese*, 213 W.Va. 339, 582 S.E.2d 786, (2003)], post-test interrogation was not an issue, but we did disapprove of the notion that an earlier *Miranda* warning had such a continuing vitality as to allow later inculpatory statements made during a polygraph test to be admissible. Both *Deweese* and the instant case point to the potential of polygraph testing in the absence of a defendant's counsel to be the occasion for development of evidence that if admitted at trial may void any subsequent criminal conviction. *See* also *State v. Chambers*, 194 W.Va. 1, 459 S.E.2d 112 (1995) (evidence regarding polygraph testing and results is inadmissible due to the tests' unreliability).

Additionally, in *Hickman, supra*, this Court emphasized that:

We have held that courts will "**indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such fundamental right.**" *Syllabus Point 2, State ex rel. Browning v. Boles*, 149 W.Va. 181, 139 S.E.2d 263 (1964) (citation omitted). *See* also *State v. McNeal*, 162 W.Va. 550, 555, 251 S.E.2d 484, 487 (1978), citing *Glasser v. United States*, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 (1942), and *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A.L.R. 357 (1938).

McNeal also noted that the burden is on the State to prove the waiver and cited *Brewer v. Williams*, 430 U.S. at 404, 51 L. Ed. 2d at 439-40, 97 S. Ct. at 1242, which summarized this law as follows:

"In determining the question of waiver as a matter of federal constitutional law . . . it was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v Zerbst*, 304 U.S. [at 464, 82 L. Ed. at 1466, 58 S. Ct. at 1023, 146 A.L.R. at 362].
(Emphasis added)

Based on the facts and law discussed above, the court's ruling allowing Mr. Middleton's January 16, 2002, post-polygraph statement to be admitted was clearly was in error. As such, Mr. Middleton's conviction and sentence should be reversed and the case remanded for a new trial.

4. It Is Clear From The Totality Of The Circumstances That Appellant's Extrajudicial Inculpatory Statement Was Not Voluntary But Was The Result Of Coercive Police Activity.

"The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case" *Syllabus Point 6* of *State v. Smith*, 624 S.E.2d 474, 218 W.Va. 127 (2005); *Syllabus Point 5*, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975). *See* also, *Syllabus Point 6* of *State v. Hickman*, 175 W.Va. 709, 338 S.E. 2d 188 (1985)

In *State v. Potter*, *supra*, the Court stated that:

Where the question on appeal is whether a confession admitted at trial was voluntary and in compliance with *Miranda* with respect to issues of underlying or historic facts, a trial court's findings, if supported in the record, are entitled to this Court's deference. However, there is an independent appellate determination of the ultimate question as to whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of *Miranda* and the United States and West Virginia Constitutions. *See Miller v. Fenton*, 474 U.S. 104, 110-14, 116-18, 106 S. Ct. 445, 449-52, 453, 88 L.Ed.2d 405, 411-13, 415-16 (1985). Indeed, recognizing the importance of determining whether a defendant's confession is, in fact, voluntary and therefore admissible, we have explicitly delineated this Court's responsibility in this inquiry in *Syllabus Point 2* of *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994).

In *Syllabus Point 2, State v. Bradshaw*, 193 W.Va 519, 457 S.E.2d 456 (1995), *cert. denied*, 516 U.S. 872 (1995), the Court held, "Whether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the **totality of the circumstances**." (Emphasis added)

The *Bradshaw* Court went on to hold in *Syllabus Point 4* that, "Where police have given *Miranda* warnings outside the context of custodial interrogation, these warnings must be repeated once custodial interrogation begins. Absent an effective waiver of these rights, interrogation must cease." The Court additionally held in *Syllabus Point 7* that, "When evaluating the voluntariness of a confession, a determination must be made as to whether the defendant knowingly and intelligently waived his constitutional rights and whether the confession was the product of an essentially free and unconstrained choice by its maker." *Bradshaw, id.*

Indeed, in *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994), the Court held that a confession admitted at trial where the trial court did not make specific findings as to the totality of the circumstances, the admission of the confession will be upheld on appeal "only if a reasonable review of the evidence clearly supports voluntariness". *Id., Syllabus Point 2*, in part.

In *Potter, supra,* the Court found that Mr. Potter's statement was given freely and voluntarily *based on* its finding, on *the uncontested facts*, that Mr. Potter was warned by Deputy Ketterman of the severity of the charges against him and counseled not to speak further about these charges and that the defendant stated he wanted to speak because he "wanted to get something off his chest." The *Potter* Court further found that prior to obtaining the defendant's confession, Deputy Ketterman had read the defendant his *Miranda* rights, obtained a written waiver of those rights, and reiterated the rights immediately before beginning the interrogation.

None of these situations occurred in the instant case and the trial court's ruling that the State had met its burden of proof that Mr. Middleton's statement was obtained voluntarily was in error.

As discussed more fully above, Mr. Middleton testified that during the five hours of interrogation following the polygraph test that he was only alone once for a few minutes in the interview room, that on several occasions up to four or five officers were in the room questioning him, that one of the interrogation officers had threatened him during the questioning (*Transcript*, pp. 97-98), that his request for an attorney was not only ignored, but mocked "innocent people don't need lawyers"(*Transcript*, p. 100), and that he was told to turn off his cell phone and it was later taken from him and never returned (*Transcript*, p. 97). Additionally, it is uncontested that Mr. Middleton was never informed that his family had hired an attorney for him, Mr. Alexander, who had called and requested that Mr. Middleton not make any statement until after he had spoken with him.

The trial court, however, found that Mr. Middleton's testimony was not credible – despite that fact that the testimony of other witnesses either collaborated, or did not dispute, large portions of it (e.g., several officers in the room at once (*Transcript*, p. 40); his cell phone was taken from him and never returned (*Transcript*, p. 35-36); he was not told his attorney had called and requested Mr. Middleton be told he was represented and should not give any statements (*Transcript*, pp. 124-125).

The trial court further found that it did not believe Mr. Middleton's claim that he had requested an attorney as the officers who testified denied that he had done so. However, as the officers did not record any of the post-polygraph interrogation (despite the fact that the equipment for doing so was present in at least one of the rooms where Mr. Middleton was interrogated) the only evidence before the trial court that Mr. Middleton had not requested an

attorney was the officers testimony. Given that much of Mr. Middleton's other testimony was collaborated by third-parties, and realistically acknowledging that it is a rare day when an officer would testify that he intentionally violated a suspect's constitutional rights, the State clearly failed to meet it burden that Mr. Middleton's post-polygraph statement was voluntary.

Based on the facts and law discussed above, the court's ruling allowing Mr. Middleton's January 16, 2002, post-polygraph statement to be admitted was clearly was in error. As such, Mr. Middleton's conviction and sentence should be reversed and the case remanded for a new trial.

B. The Circuit Court Erred In Denying Appellant The Opportunity To Confront The Complaining Father Of The Children Or To Present Evidence That He Had Ill Motive And Intent Toward Appellant And Had Filed Prior False Reports With The Authorities.

"The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 124 S.Ct. 1354, 541 U.S. 36, 158 L.Ed.2d 177 (2004).

In the instant case, the appellant intended to start his case-in-chief with the testimony of Officer Duff of the Jefferson Police Department, Kanawha County, West Virginia. The subject of Officer Duff's testimony was a main component of Mr. Middleton's defense theory, particularly after the trial court had ruled the January 16, 2002, statement admissible.

As summarized by Mr. Middleton's defense counsel, Mr. Hively, Officer Duff's testimony would go to the motive, intent and truthfulness of Mr. Wilkins' allegations against Mr. Middleton.

Officer Duff would testify that since the parties' divorce, Mr. Wilkins had filed numerous false police reports against Mrs. Wilkins regarding the children, and on at least one occasion also

against a previous boyfriend of Mrs. Wilkins. Further, that every one of those reports had been thoroughly investigated and was found to be false. (*Transcript*, pp. 337-338; 348-352) The evidence would have additionally showed that the filing of the false reports frequently corresponded to the time Mr. Wilkins was to appear in court regarding back child support payments. (Indeed, at the time Mr. Wilkins filed the report against Mr. Middleton, he and Mrs. Wilkins were once again in court over his child support arrearage of nearly $10,000.00.)

Despite this proffer of evidence, the trial court proceeded to make two rulings that gutted Mr. Middleton's defense. The first was that Officer Duff would not be permitted to testify for the defense because he was attacking Mr. Wilkins, who had not testified. The second ruling was that, even if Mr. Wilkins testified (for the State or as a defense adverse witness), the defense would not be allowed to question him on these matters and thus, still could not present Officer Duff's testimony. (*Transcript*, pp. 348-352)

A review of the hearing transcript reveals the trial court's apparent reasoning was for these decisions as being that "this man is not making an accusation here; is he? Isn't it his daughter that's making an accusation?" and as such, any motive or intent he might harbor was irrelevant. (*Transcript*, pp. 349-352) Given the evidence in the case, particularly Trooper Nichols admitted testimony that he began his investigation, and based his actions on the allegations against Mr. Middleton made by Mr. Wilkins, the trial court's coming to the conclusion it did flies in the face of all logic, as well as the law.

In *Crawford v. Washington*, 124 S.Ct. 1354, 541 U.S. 36, 158 L.Ed.2d 177 (2004), The United States Supreme Court dealt specifically with the issue of testimonial hearsay being admitted without the defendant being allowed to cross-examine the witness and held that:

> The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation…
> **The Clause's primary object is testimonial hearsay**…
> Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination…
> The **Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination**. (Emphasis added)

Indeed, this Court has long held that the primary purpose of the confrontation clause contained in W. Va. Const. art. III, Section(s) 14, "[I]n all such trials, the accused shall be…[c]onfronted with the witness against him…" as well as the confrontation clause of the Sixth Amendment to the United States Constitution, coupled with the Fourteenth Amendment:

> [i]s to advance a practical concern for the accuracy of the truth-determining process in criminal trials, and the touchstone is whether there has been a satisfactory basis for evaluating the truth of the prior statement. **An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices, or motives.** (Emphasis added)

Syllabus Point 7, State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001); *Syllabus Point 1, State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995). *See* also, *State v. Eye*, 177 W. Va. 671, 673, 355 S.E.2d 921, 923 (1987) ("The confrontation clause of the Sixth Amendment to the United States Constitution, coupled with the Fourteenth Amendment, guarantees the right of an accused in a criminal prosecution to confront the witnesses against him.).

In *Syllabus Point 1* of *State v. Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990), this Court held:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. **It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,** preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va. R. Evid. 404(b). (Emphasis added)

Recently, in *Syllabus Point 2* of *State v. Martisko*, 211 W.Va. 387, 566 S.E.2d 274 (2002), the Court reaffirmed its holding in *Syllabus Point 3* of *State v. Jenkins*, 195 W. Va. 620, 466 S.E.2d 471 (1995), that:

> While ordinarily rulings on the admissibility of evidence are largely within the trial judge's sound discretion, **a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense,** and to be represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, § 14 of the West Virginia Constitution." Syl. pt. 3, State v. Jenkins, 195 W. Va. 620, 466 S.E.2d 471 (1995).

Indeed, in *Holmes v. South Carolina*, No. 04-1327 (U.S. 05/01/2006), the United States Supreme Court recently revisited this issue and held that:

> "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U. S. 303, 308 (1998); *see* also *Crane v. Kentucky*, 476 U. S. 683, 689-690 (1986); *Marshall v. Lonberger*, 459 U. S. 422, 438, n. 6 (1983); *Chambers v. Mississippi*, 410 U. S. 284, 302-303 (1973); *Spencer v. Texas*, 385 U. S. 554, 564 (1967). This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, **the Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense'** " *Crane*, *supra*, at 690 (quoting *California v. Trombetta*, 467 U. S. 479, 485 (1984); citations omitted). (Emphasis added)

It cannot be denied that the trial court's refusal to allow appellant to present evidence showing not only that Mr. Wilkins had strong motives for making false allegations against Mr. Middleton (and indirectly, his ex-wife), but additionally that Mr. Wilkins had actually filed false reports with the police against his ex-wife and a previous boyfriend several times prior to making the instant allegations, completely forestalled appellant from "a meaningful opportunity to present a complete defense." *Holmes*, *supra.*

As to the prosecution's argument, and the trial court's further finding that Mr. Wilkins could not be questioned regarding his motive or intent in making the allegations against Mr.

Middleton to Trooper Nichols as Mr. Wilkins had not been a witness in the case, *Rule 806* of the *West Virginia Rules of Evidence*, clearly shows it to be in error. *Rule 806* specifically allows attacking the credibility of a declarant:

> **When a hearsay statement**, or a statement defined in Rule 801(d)(2)(C), (D), or (E) **has been admitted in evidence**, the **credibility of the declarant may be attacked**, and if attacked may be supported, **by any evidence which would be admissible for those purposes if declarant had testified as a witness**. Evidence of a statement or conduct by the declarant at any time, inconsistent with his or her hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. **If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.** (As amended by order entered June 15, 1994, effective July 1, 1994.)

As defense counsel argued to the trial court, while Mr. Wilkins had not been a witness in the case, the hearsay statements he had made had been testified to, particularly by Trooper Nichols. (*Transcript*, p. 266) Indeed, it was the allegations Mr. Wilkins made to Trooper Nichols about Mr. Middleton that initiated and fueled the case against Mr. Middleton. When the trial court indicated it would not allow Officer Duff's testimony based on that argument, the question arose as to whether calling Mr. Wilkins would then open up the area for questioning. The trial court then ruled, however, that even if Mr. Wilkins was called as a witness, he could not be questioned about these matters. (*Transcript*, pp. 348-352)

The trial court made this ruling even though Trooper Nichols had already repeatedly testified as to what Mr. Wilkins told him and stated that he had initiated the investigation against Mr. Middleton based on those statements (*Transcript*, pp.266-267). This clearly deprived Mr. Middleton of his right to "examine witnesses against him or her, to offer testimony in support of his or her defense" (*Martisko, supra)* and to attack Mr. Wilkins' credibility (*Rule 806, supra*).

The trial court, however, refused the defense the opportunity to show ill motive and intent in Mr. Wilkins' filing the report against Mr. Middleton, either by calling Officer Duff or by allowing Mr. Wilkins to be called and examined on the matter

Given the facts and law discussed above, the trial court's rulings on this matter were clearly erroneous and deprived Mr. Middleton of his right to present a defense. As such, Mr. Middleton's conviction and sentence should be reversed and the case be dismissed or remanded for a new trial.

C. The Circuit Court Erred In Failing To Credit Petitioner's Incarceration Time To Both Counts At Sentencing.

On July 25, 2005 the Appellant, Kevin Ray Middleton was sentenced to an indeterminate term of ten (10) to twenty (20) years on Count I and an indeterminate term of one (1) to five (5) on Count II. Said sentences were to run consecutively. However, the Court only granted Mr. Middleton the credit for his time served as to Count I and no credit for time served as to Count II. The total credit for time served was 185 days.

While this Court has held that, "Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." *Syl. Pt. 4, State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982), it is uncontested that Mr. Middleton had been incarcerated both pre-indictment and post-jury verdict on both counts prior to the sentencing.

The court's ruling not giving him credit for his time served as to both counts is both contradictory and erroneous. As such, Mr. Middleton should be given credit for time served as to both Count I and Count II.

VI. CONCLUSION AND RELIEF REQUESTED

Based on the facts and law discussed above, it is clear that Circuit Court erred both in allowing Mr. Middleton's January 16, 2002, post-polygraph statement to be admitted and in refusing to allow the defense to present testimony attacking the motive and credibility of Mr. Wilkins. It is also clear that the trial court erred in refusing to credit Mr. Middleton's time served to his sentences for both Counts I and II.

Therefore, Appellant, Kevin Ray Middleton, respectfully requests that his conviction and sentence be reversed and the case against him be either dismissed or remanded for a new trial.

Respectfully submitted,

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston

STATE OF WEST VIRGINIA,

Appellee,

v. **Appeal No.: 33048**

KEVIN RAY MIDDLETON

Appellant/Defendant Below.

CERTIFICATE OF SERVICE

I, Kathleen T. Pettigrew, counsel for the Appellant, do herby certify that I have served true copies of the "Brief of the Appellant" on:

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And

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By postage-paid, first-class, U.S. Mail, this 26th day of May, 2006.

Kathleen T. Pettigrew